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SCOPE OF ADMINISTRATIVE LAW

To the Anglo-American, the term administrative law is one which has a comparatively narrow meaning. "The term 'administrative law,'" stated Freund, in 1911, "has in relatively recent times gained acceptance as the best designation for the system of legal principles which set the conflicting claims of executive or administrative authority on the one side, and of individual or private right on the other." The Anglo-American administrative lawyer has been concerned mainly with the delegation of authority to the administration and the judicial control of administrative action. In recent years, his approach to the subject has broadened so as to include the aspect of administrative procedure. This has been brought about by the realization that the exercise of power by the administration is at least of as great importance as the control of such power by the courts. And with this realization has come the emphasis upon procedural safeguards to ensure the proper exercise of administrative authority—an emphasis that has recently found legislative articulation in this country in the Federal Administrative Procedure Act and its state counterparts.

In its emphasis upon procedures within the administration, the Anglo-American administrative lawyer's approach to his subject is undoubtedly wider in scope today than it was a generation ago. To a foreign observer, however, schooled in the administrative law of a civil-law country such as France, the Anglo-American's approach appears still to be unduly narrow.

If one looks at the contents of a recent work on the *droit administratif,* such as the 1951 edition of the *Elementary Treatise on Administrative Law* (*Traité Élémentaire de Droit Administratif*) by Marcel Waline, the outstanding contemporary treatise on the subject, he will be amazed at its scope, as compared with that of a comparable Anglo-American work. Thus, to take the most complete American text on the subject—*Davis on Administrative Law*—as an example, it contains three broad divisions: 1) the transfer of authority from the legislature to the administration (reduced to a minimum in the treatment of the subject by Davis); 2) administrative procedure (the main point of emphasis); and 3) ju-

dicial review (still treated as a vital aspect of the subject, though with emphasis more upon the availability than the scope of review).

These headings occupy but a small part of Waline's work on the *droit administratif*. In addition, he treats in great detail of the various forms of administrative agencies (what he terms the "subjects of rights" in administrative law); the exercise of and limitations upon the administrative regulatory power; what we in this country would term the law of the civil service; the acquisition and management of property by the administration; public works; and the obligations of the administration (subdivided into contracts, quasi-contracts, and tort liability).

The Anglo-American administrative lawyer will immediately object that these are matters for the science of public administration, not administrative law. As such, they are primarily the concern of the political scientist rather than the lawyer. As stated in *Davis on Administrative Law*, "Administrative law, as the term is here used, is limited to law concerning powers and procedures; . . . a large portion of the law of public administration is thus excluded."

To the non-American, the approach of the Anglo-American administrative lawyer leaves out much that is essential to a branch of the law which has for its aim the canalization of administrative authority by law. His viewpoint can be seen in the Preface recently prepared by a distinguished member of the French Council of State for a book seeking to explain American administrative law to the French lawyer. Such book, says he, written by an American administrative lawyer, "furnishes us with a summary of administrative law in the narrow sense in which that term is understood in the author's country; the reader should not expect a picture of the American administration's machinery, services, jurisdiction, and means of action. The book . . . covers a field much less vast than that of an even summary manual of French administrative law." Puget, in *Schwartz, Le Droit Administratif Américain: Notions Générales* vi (1951).

It must be admitted that French criticisms of the Anglo-American administrative lawyer's approach to his subject contain a great deal of force. As stated by an English writer, who is one of the few to have expressed this view in the common-law world, "Administrative law should be regarded as the law relating to public administration, in the same way as commercial law consist of the law relating to commerce or land law the law relating to land." Robson in *British Government Since 1918*, 88 (1950). For the administrative lawyer to abdicate the law of public administration, leaving its development almost entirely to the political scientist, is to leave a great part of the law governing administration in the same wholly unsystematized state that the field covered by a work such as *Davis on Administrative Law* was in some fifty years ago.

FEDERAL LEGISLATION

S. 1770, the McCarran bill to remove most of the numerous exemptions from the Administrative Procedure Act, was passed,

with amendments, by the Senate on October 11, 1951, and is now before the House Judiciary Committee.

The importance of this bill is apparent to anyone who has studied developments since the enactment of the APA. The cases under that Act, some of which are discussed later in this Bulletin, indicate clearly that the Supreme Court will give the widest possible effect to its applicability provisions. This does not, however, of itself mean that the APA applies in every case in which the evils it was aimed at appear. For the Congress has indicated that it does not intend fully to give effect to its own purpose in 1946 in passing an act to apply uniformly to the entire administrative process. Thus, soon after the decision of the Supreme Court in *Wong Yang Sung v. McGrath*, 339 U. S. 33 (1950), a rider was inserted in the Supplemental Appropriations Act, 1951, providing that deportation proceedings were henceforth to be without regard to the provisions of the APA, and similar exemptions for particular agencies from the requirements of the APA are contained in roughly a score of statutes enacted since 1946. In the words of the Senate Judiciary Committee:

> "The successive granting of exemptions to certain administrative operations from the terms of the act serves only to chip away, the framework of what was intended to be a uniform structure of safeguards for the citizen in his dealings with Federal administrative agencies."

S. 1770 would eliminate most of the exemptions from the APA. It should be noted that, even under S. 1770, the exemption of deportation proceedings from the APA would continue. This is true despite the strong opinion of the Supreme Court in the *Wong Yang Sung* case that a deportation proceeding is of the very essence of what the APA provisions were aimed at.

SUPREME COURT

The year 1951 was particularly rich in significant administrative-law decisions by the Supreme Court. Some of them have already been discussed in prior issues of this Bulletin. The following analysis is intended to complete the picture of last year's jurisprudence of the highest tribunal.

Right to be heard.—In two cases decided by the Supreme Court, there was involved one of the most difficult problems presented in the field of administrative law, that of the right to be heard prior to administrative action which, it is claimed, does not adversely affect personal or property "rights", as that term has been generally understood in our law. In one case, the Court decided without rendering any opinion, affirming by an equally divided vote, the decision of a divided Court of Appeals. In the other, there was a separate opinion by each of the five Justices who concurred in the decision.

In *Bailey v. Richardson*, 341 U. S. 918 (1951), plaintiff sought a declaratory judgment and an order directing her reinstatement in government employment. Plaintiff had been discharged after she had been found by the Loyalty Review Board to be "disloyal to the Government of the United States." Among other things, the complaint alleged that plaintiff had not been afforded, before the Board, a hearing such as due process required in a case of this type.

The Court of Appeals for the District of Columbia, in a two-to-one decision, upheld the administrative procedure which had been followed. 182 F. 2d 46 (App. D. C. 1950). The Supreme Court affirmed, four-to-four, Justice Clark abstaining, without any opinion. The opinion of the Court of Appeals thus remains as *the* opinion in the case, and, because of the significance of the problem involved, it is important to go into its basis.

According to Judge Prettyman, who delivered the opinion of the Court of Appeals, the due process clause does not restrict the President's discretion or the prescriptive power of Congress in respect to executive personnel. The reason why he reaches this conclusion can be gathered from the following passage in his opinion:

> "In the absence of statute or ancient custom to the contrary, executive offices are held at the will of the appointing authority, not for life or for fixed terms. If removal be at will, of what purpose would process be? To hold office at the will of a superior and to be removable therefrom only by constitutional due process of law are opposite and inherently conflicting ideas. Due process of law is not applicable unless one is being deprived of something to which he has a right." (58).

The opinion of the federal court thus turns upon the fact that the government employee does not have any "right" to his employment which the courts will protect. As it was recently expressed by the New York Court of Appeals, in an opinion dealing with basically the same problem presented in the *Bailey* case, "A public employee has no vested, proprietary right to his position . . . public employment as a teacher is not an uninhibited privilege." *Thompson v. Wallin,* 301 N. Y. 476, 489 (1950).

When once the government employee is treated as having only a "privilege" and not a "right" in his position, under the weight of authority in this country, he would appear not to be protected by the requirements of procedural due process. Although administrative action adversely affecting particular individuals must be preceded by notice and hearing as a matter of due process, the courts have held that this is true only in cases involving personal or property "rights." If the case concerns only a "privilege", there is no requirement that those affected be heard, unless the enabling act expressly imposes such requirement.

The use of the distinction between so-called property rights and privileges, as the basis for determining whether notice and hearing are required has been much criticized, especially in its application to cases involving government employees. The fact that the legislature can deny a privilege such as government employment altogether should not mean that it can be denied to particular individuals without notice and hearing. It should, however, be recognized that the courts have tended to follow the "right-privilege" distinction in determining whether notice and hearing need be accorded in particular cases. *Bailey v. Richardson* is but the most recent example of this tendency, though it is to be greatly regretted that the equal division in the Supreme Court in that case has prevented that tribunal from articulating its views upon the subject.

In *Bailey v. Richardson,* we are unfortunate in not having any opinion by the Su-

preme Court to aid us in dealing with the problem of whether notice and hearing are required in cases involving government employees. In *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123 (1951), which dealt with a related aspect of the problem, we are equally unfortunate, but for the opposite reason. Here, we have not a paucity, but an over-abundance of opinions. (By Burtin, Black, Frankfurter, Douglas, and Jackson, J. J., as well as a dissent by Reed, J.) And it is, in some ways even more difficult to determine exactly what the Court's views are in the *Anti-Fascist Committee* case than in *Bailey v. Richardson.*

Plaintiff in the *Anti-Fascist Committee* case sought an injunction to restrain the Attorney General and the Chairman and members of the Loyalty Review Board from designating it as a subversive organization. Under Executive Order 9835, promulgated by the President on March 21, 1947, the Attorney General is to furnish the Loyalty Review Board with the name of each organization which he, "after appropriate investigation and determination", designates as subversive. The Board is directed to disseminate such information to all departments and agencies to guide them in employing and discharging employees. In the instant case, the complaint was based upon the action of the Attorney General, without notice or hearing, in designating plaintiff as a subversive organization and listing its name as such in a letter to the Loyalty Review Board, and the action of the Board in distributing the letter to departments and agencies in the executive branch of the Government and releasing the same to the public press. Since the Government moved to dismiss the complaint, all of its allegations must be taken as admitted for the purposes of the decision.

The question of whether the Attorney General could act without notice and hearing in a case of this type is dealt with most adequately in the concurring opinion of Justice Frankfurter and the dissenting opinion of Justice Reed. Justice Reed's approach is much like that which has already been discussed. Notice and hearing is required before valid administrative action can be taken, says he, only where complainant will lose some property or enforceable civil or statutory rights by the action taken or proposed. There is no deprivation of any property or liberty of any listed organization by the Attorney General's designation. A "mere abstract declaration" by an administrator regarding the character of an organization, without the effect of forbidding or compelling conduct on the part of plaintiff, does not require notice and hearing. (202-03.)

To Justice Frankfurter, a different approach is the desirable one. In the first place, says he, it is unreal to assert that, because the Attorney General's designation imposes no legal sanction upon listed organizations, this is a mere abstract declaration which does not directly affect plaintiff. "It would be blindness . . . not to recognize that in the conditions of our time such designation drastically restricts the organizations, if it does not proscribe them." (161). The learned Justice then proceeds to discuss the due process aspect of administrative law. The requirement of due process, he asserts, "is not a fair-weather or timid assurance". (161). It must be respected at all times. Nor is it

a technical conception with a fixed content, which can be "imprisoned within the treacherous limits of any formula" (*Ibid*) which would imply the rejection of any mechanical test, such as the "right-privilege" distinction discussed above. The cases in which it has been held that due process requires a full hearing prior to administrative action are then summarized, and one feels that Justice Frankfurter is on the verge of asserting that due process demands notice and hearing before the Attorney General can act in this case.

But the assertion is never made. The opinion goes on to state that Executive Order 9835 itself must be interpreted so as to require a hearing. Statutes and regulations, says Justice Frankfurter, should be construed so as not to be inconsistent with the demands of fair procedure. There is a burden upon the Attorney General of showing weighty reason for the departure from a rule so deeply imbedded in history and in the demands of justice. The Executive Order states only that the Attorney General should act "after appropriate investigation and determination." This does not preclude a full hearing and the Order should be construed so as to require it.

What then is the exact status of the procedural aspect of the Federal Government's loyalty program? It should be borne in mind that, in neither *Bailey v. Richardson* nor the *Anti-Fascist Committee* case, has the Supreme Court held that the procedure prescribed by Executive Order 9835 violates the demands of due process. Under the *Bailey* case, indeed, it is clear that a government employee, may be discharged for disloyalty without being afforded a full hearing. In the *Anti-Fascist Committee* case, there are, it is true, indications that due process demands a hearing before an organization can be listed as subversive by the Attorney General. It is not, however, clear why the organization has a "right" which is protected by due process in these cases, while the government employee, who may lose his job because of his membership in an organization upon the Attorney General's list, has only an unprotected "privilege." The answer of some of the Justices to this would undoubtedly be that the organization is defamed by an unjust listing, and it is its right not be defamed that is adversely affected by the administrative action. This may be true, but it is difficult to see why it does not apply as well to the government employee. Is not Mrs. Bailey stigmatized at least as much as the Anti-Fascist Committee when she is discharged because she is found to be "disloyal to the Government of the United States"?

Administrative Procedure Act: Applicability.—

In two important decisions rendered in 1951, the Supreme Court has indicated that it meant what it said in *Wong Yang Sung v. McGrath*, 339 U. S. 33 (1950). The first of them, *Riss & Co. v. United States*, 341 U. S. 907 (1951), has been fully discussed in Vol. 3, No. 2, p. 39, of this Bulletin. The second of them, *Cates v. Haderlein*, 342 U. S. 804 (1951), concerned a fraud order of the Postmaster General. The statute which authorizes the Postmaster General to issue postal fraud orders does not expressly use the term "hearing". It does, however, provide that the Postmaster General may act "upon evidence satisfactory to him." Is the obligation imposed upon the Post-

master General tantamount to a statutory requirement of a "hearing" within the meaning of section 5 of the APA? The Court of Appeals for the Seventh Circuit felt that it was not. But, as it had done in the *Riss* case, the Supreme Court reversed *per curiam*, this time upon the Government's confession of error.

The *Riss* and *Cates* cases indicate clearly that the Supreme Court was in earnest when it said what it did about the applicability of the APA in *Wong Yang Sung v. McGrath*. The latter decision might have been acquiesced in by the agencies at once. As stated by Chief Justice Hughes, the maintenance of proper standards on the part of administrative agencies in the performance of their adjudicatory functions "is of the highest importance and in no way cripples or embarrasses the exercise of their appropriate authority. On the contrary, it is in their manifest interest." *Morgan v. United States*, 304 U. S. 1, 22 (1938).

Findings—In *State of New York v. United States*, 72 Sup. Ct. 152 (1951), the court affirmed *per curiam*, without opinion, a decision of the district court upholding an ICC order increasing intrastate commuters' fares in New York to the level of interstate fares. Justice Douglas dissented, in strong terms, on the ground that the ICC had not supplied an adequate basis for its decision. It merely found that the interstate rates were reasonable and fixed intrastate rates at the same level. But there was no finding as to the necessary relation between interstate and intrastate commutation rates. The dissent concluded:

> "Unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion. Absolute discretion, like corruption, marks the beginning of the end of liberty. This case is perhaps insignificant in the annals. But the standard set for men of good will is even more useful to the venal."

It is to be regretted that, in a case which called forth this statement from a Justice who has heretofore not been unfriendly toward administration, the Court did not see fit even to articulate the bases of its decision.

Administrative Finality—United States v. Wunderlich, 342 U. S. 98 (1951), dealt with the meaning of the so-called "finality clause" of the standard form government contract. That clause provided that all disputes involving questions of fact should be decided by the contracting officer, with the right of appeal to the head of the department, "whose decision shall be final and conclusive upon the parties thereto." In *United States v. Moorman*, 338 U. S. 457 (1950), the Court had held that this provision barred recourse to the courts, although there was language in the opinion that this would not be true if the findings of the contractually designated agent were "impeached on the ground of fraud, or such gross mistake as necessarily implied bad faith." In the instant case, the Court of Claims, relying upon this language, had granted recovery, since it found that the decision of the department head was "arbitrary", "capricious", and "grossly erroneous", 117 Ct. Cl. 92 (1950). But the Supreme Court, speaking through Justice Minton, held that "these words are not the equivalent of fraud", (100) and it is only

fraud which enables the courts to disregard the finality clause.

Under the *Wunderlich* case, in the absence of fraud, all recourse to the courts is barred completely by a finality clause in a government contract. And, according to the Court, by fraud "we mean conscious wrong doing, and intention to cheat or be dishonest." (100) Such fraud must be alleged and proved; it is never presumed.

Administrative finality is explainable legally here because a government contract is considered as a "privilege", not a "right". Where the state grants a privilege, such as a government contract, it can do so on any terms it wishes, including one precluding recourse to the courts. This does not, however, mean that the legal result is the desirable one. As stated by Justice Douglas, who dissented in the *Wunderlich* case, "the rule we announce has wide application and a devastating effect. It makes a tyrant out of every contracting officer." (101).

Whether it is realistic to assert that the *Wunderlich* result is justified on contract principles, since the parties of their own free will have inserted the finality clause in their contract may be questioned.

Yet, even if the principle of freedom of contract in government contract cases be more than a pious fiction, the result in the *Wunderlich* case is not thereby justified. As expressed by Justice Jackson in dissent, undoubtedly parties to a contract can agree to put decision of their disputes in the hands of one of them. But, this should not mean that the one who decides should be wholly free to act arbitrarily. "One who undertakes to act as a judge in his own case . . . should be under some fiduciary obligation to the position which he assumes." (103).

Most criticisms of administrative finality proceed from the point of view of the private citizen who is adversely affected by administrative action. Thus, the dissenting Justices in the *Wunderlich* case feared mostly the effect of the Court's decision upon the private contractor, for, said they, the decision gave the contracting officer the power of life and death over a private business. What is often overlooked, however, is the effect of administrative finality upon the Government itself. In a democratic system, government as a whole has a basic interest in insuring that its officials will conform to law. It is in the interest of the administration itself that it is not made the final judge of the validity of its action. When a citizen, who is adversely affected by an illegal administrative act, is barred from recourse to the courts, it is not he alone who is injured. An improper act of the administration has been permitted to go untouched and the interest which a democratic society has in the vigorous enforcement of the principle of administrative legality has thereby been left unvindicated.

This has been recognized, to some extent, by the Government itself after the *Wunderlich* case. According to the General Counsel of the General Accounting Office, there may be need for Congressional action as a result of that case. Under the *Wunderlich* case, a department head, by arbitrary action, could "toss away the taxpayer's money" and the General Accounting Office would have no recourse for collecting a refund unless fraud on the part of the contracting officer or his department head could be proved. (See 20 Law Week 2227.)

Administrative finality can thus prove to be a two-edged sword, barring recovery by the Government as well as by the private contractor.

Reviewable Action. — Joint Anti-Fascist Refugee Committee v. McGrath, 341 U. S. 123 (1951), which has already been discussed from the point of view of procedural due process, involved administrative action which was claimed by the Government to be, as yet, unripe for review. In that case, it will be recalled, plaintiff organization sought injunctive relief against its designation by the Attorney General as subversive in a list furnished by him to the Loyalty Review Board and disseminated by it to executive departments and agencies to guide them in employing and discharging employees. For the Government, it was urged that the challenged administrative action did not, of itself, have any adverse effect upon plaintiff. It might well be that there would ultimately be direct effect, but only on the contingency of further administrative action. Thus, government employees who were members in plaintiff organization might be discharged from employment solely because of their membership. It was only then, it was argued, that there would be the direct adverse effect which was necessary before administrative action could be challenged in the courts.

This was essentially the argument which was made and rejected by the Court in *Columbia Broadcasting System* v. *United States,* 316 U. S. 407 (1942). And the similar argument made in the *Anti-Fascist Committee* case was likewise rejected by the majority of the Court. The question as to what is the rule of the case is one which cannot be answered with complete certainty. What is, however, clear from the result reached is that with regard to the immediate point with which we are here concerned, that of the reviewability of the action of the Attorney General and the Loyalty Review Board, all of the majority Justices decided in favor of reviewability.

Justice Reed, who dissented, adopted the argument of the Government which had been sustained by the lower courts. The challenged administrative action, he asserted, does not directly affect the listed organizations. "These petitioners are not ordered to do anything and are not punished for anything." (203). But it has been recognized ever since the *Rochester Telephone* case, 307 U. S. 125 (1939), that the mere fact that administrative action does not affirmatively compel or forbid conduct on the part of the person seeking review is not, of itself, conclusive upon the question of reviewability. Let there be direct adverse effect upon a legally protected right and recourse to the courts is available. Here, the right of a bona fide charitable organization to carry on its work, free from defamatory statements on the part of the administration, is a right which the law will protect. And, as stated by Justice Burton,

> "It is unrealistic to contend that because the respondents gave no order directly to the petitioners to change their course of conduct, relief cannot be granted against what the respondents actually did. We long have granted relief to parties whose legal rights have been violated by unlawful public action although such action made no direct demands upon them." (141).

"Justice Turned Bottom-side up".—In the *Anti-Fascist Committee* case, an organization listed as subversive by the Attorney General and the Loyalty Review Board was held to have standing to obtain review. In *Bailey v. Richardson,* however, a two-to-one decision by the Court of Appeals for the District of Columbia, 182 F. 2d 46, which was affirmed without opinion by an equally divided Supreme Court, 341 U. S. 918, the individuals most directly affected by the Federal Government's loyalty program, namely, the government employees who are dismissed because they are found to be disloyal were held not to be able to secure review. That the results in the two cases are not wholly consistent has been strongly urged by Justice Jackson:

> "By the procedures of this Loyalty Order, both groups and individuals may be labeled disloyal and subversive. The Court grants judicial review and relief to the group while refusing it to the individual. So far as I recall, this is the first time this court has held rights of individuals subordinate and inferior to those of organized groups. I think that is an inverted view of the law—it is justice turned bottom-side up." (186)

That there is some inconsistency in the results in the *Anti-Fascist Committee* and *Bailey* cases cannot be denied. This inconsistency can only be explained, if at all, by the fact that the *Bailey* case, in the opinion of the Court, involved only the "privilege" of a government employee to retain his position, while the *Anti-Fascist Committee* case involved something more—the "right" of an organization to carry on its work free from defamatory statements.

The result in the *Bailey* case thus depends upon the conception of government employment which prevails in our legal system. We tend to look upon employment by the State as analogous to employment by a private employer. The relationship as between employer and employee is a contractual one, and the employee has only the rights and obligations contained in his employment contract. Civil servants, in the common-law conception, are thus solely "employees" of the government, and, as such, have only the status which the law generally accords to employees. "The situation of the Government employee is not different in this respect from that of private employees." 182 F. 2d at 60. In the absence of provisions to the contrary in statutes or regulations, the State has the same discretion with regard to the appointment and dismissal of its employees that any private employer has.

The result of this assimilation of the position of the civil servant to that of the ordinary private employee is that the civil servant is not protected, *qua* employee, by the principles of administrative law that have been developed by our courts. American administrative law is a system which governs the relations between the administration and private individuals. Its principles are not applicable where the administration acts only with regard to its employees, in matters relating to their employment.

In our system the government employee is not treated as one vested with "rights" which the courts will enforce. "The petitioner may have a constitutional right to talk politics", reads a famous statement of Mr. Justice Holmes, "but he has no consti-

tutional right to be a policeman." *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220 (1892).

Constitutional fact—The present status of the doctrine of *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U. S. 287 (1920), which requires a determination by the reviewing court upon its own independent judgment as to both law and facts when an administrative determination is attacked on constitutional grounds, is, to say the least, a doubtful one. Ever since the *Rowan & Nichols Oil Co.* cases, 310 U. S. 573, 311 U. S. 614 (1940); 311 U. S. 570 (1941), it has been widely assumed that the *Ben Avon* case would not be followed by the present Court. On the other hand, that case has never been expressly overruled, so that its present position remains a doubtful one.

In *Alabama Public Service Commission v. Southern R. Co.*, 341 U. S. 341 (1951), the district court had followed that *Ben Avon* doctrine and heard evidence *de novo*. The Supreme Court, in reversing, did not deal directly with the question of the application of that doctrine. In the course of his opinion, the Chief Justice did, however, state: "[w]hatever the scope of review of Commission findings when an alleged denial of constitutional rights is in issue, it is now settled that a utility has no right to relitigate factual questions on the ground that consitutional rights are involved." (348) This certainly would seem to imply that the *Ben Avon* doctrine is no longer law.

It should, however, be noted that one of the members of the Court, who has, in the past, appeared to be most hostile to *Ben Avon*, Justice Frankfurter, has cited that case, without any indication of disapproval, both in dissent in the *Alabama Power Commission* case (362), and in another recent case, *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, 165 (1951).

APA AND SCOPE OF REVIEW

Findings of fact.—In *Universal Camera Corp. v. NLRB*, 340 U. S. 474 (1951) and *NLRB v. Pittsburgh S. S. Co.*, 340 U. S. 498 (1951) which were discussed in Vol. 3, No. 2, p. 35, of this Bulletin, the Supreme Court dealt with the effect of The Administrative Procedure Act upon the scope of review of federal administrative action. That Act, said the court, has materially broadened the reviewing power of the Federal courts.

One of the interesting developments since the Court's decisions has been the continued assertion by some that they have not really been of great significance. As these observers see it, the two decisions by Justice Frankfurter have done no more than to make express what had previously been clearly implicit in the federal theory of review. According to them, the substantial evidence test, as it has been applied by the federal courts, already required the courts to search for substantiality of supporting evidence in the light of the record considered as a whole. As expressed by Professor Jaffe, "Obviously responsible men would not exercise their judgment on only that part of the evidence that looks in one direction". *64 Harv. L. Rev. at 1235.* The direction at the end of section 10 (e), of the APA that the reviewing court determine substantiality in the light of the "whole record" is thus seen to have added nothing of substance to the law of review.

Few will deny that Professor Jaffe's approach is the way the substantial evidence test ought to be applied. At the same time, it cannot be gainsaid that some of the federal courts had given the impression that they were not applying the test in that way. According to the minority of the Attorney General's Committee on Administrative Procedure, under a prevalent interpretation of the substantial evidence rule, if substantial evidence was found anywhere in the record to support a finding, some courts felt they would have to sustain the finding no matter how heavily the countervailing evidence might preponderate. *Report, 210.*

It may be, as one commentor has asserted, that the notion that a reviewing court should ignore all the evidence on one side "has so little to commend it that many will find surprising the Court's serious treatment of that possibility." *Davis on Administrative Law,* 872. Still it cannot be denied, as Professor Jaffe, speaking for those who felt that the courts had always been applying the substantial evidence test in the light of the whole record, has conceded, that, in the *Universal Camera* and *Pittsburgh S. S.* cases, "the Supreme Court flatly gave the lie to our pious assumptions." *64 Harv. L. Rev. at 1235.*

As it was put during the oral argument in the *Pittsburgh S. S.* case by Justice Frankfurter, who presumably knows better than even the most acute outside observer just what he had been doing in cases involving review of administrative action, the substantial evidence test "means if I find something in the evidence which supports it [*i.e.*, the administrative finding], my case is at an end. That is what I thought I had been doing." *Quoted in ibid.*

If section 10 of the APA means anything, it means that the courts on review can no longer approach cases the way Justice Frankfurter states that he did. And this indeed, is the effect of the decisions in the *Universal Camera* and *Pittsburgh S. S.* cases. It is true that one would have to be singularly naive to conclude that those decisions lay down a mathematically clear guide to reviewing courts. Justice Frankfurter himself conceded this in his opinions. All that one can say with certainty is that the Court has given a green light to the federal courts to apply a wider theory of review, but exactly how much wider review is to be remains to be seen.

That the scope of review has, in fact, been broadened since the Supreme Court decisions is to be seen from several lower court decisions. According to Judge Learned Hand, upon remand of the *Universal Camera* case, 190 F. 2d 429 (2d Cir. 1951), the Supreme Court intended to prescribe an attitude in Courts of Appeal less complaisant toward administrative findings than had been proper before. Not only were they to look to the record as a whole, but they were to be less ready to yield their personal judgment on the facts. On issues on which the Board's specialized experience does not equip it "with inarticulate major premises inaccessible to judges", the courts are to be deemed as competent as the board to pass upon issues of fact. And, in the instant case, Judge Hand stated that all the issues at bar were of this type, and the court could not therefore accept the Board's argument that "we are not in as good a position as itself to decide what witnesses were more

likely to be telling the truth in this labor dispute." 190 F. 2d at 430. If Judge Hand is correct on this, then the scope of review has, indeed, been broadened, for it had previously been settled that questions of credibility were for the NLRB, not the courts. See, also, as indicating a broadening of review under the APA, *Consolidated Royal Chemical Corp.* v. *FTC*, 191 F. 2d 896 (7th Cir. 1951); *Minneapolis-Honeywell Co.* v. *FTC*, 191 F. 2d 786 (7th Cir. 1951); *NLRB* v. *Hart Cotton Mills*, 190 F. 2d 964 (4th Cir. 1951); *Hudnell* v. *O'Hearne*, 99 F. Supp. 954 (D. Md. 1951).

Questions of law. What the Supreme Court giveth, it can also take away. Just when the *Universal Camera* and *Pittsburgh S. S.* cases have led one to believe that the Court was on the verge of drastically broadening the scope of review, he comes upon *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U. S. 504 (1951), decided the same day, discussed in Vol. 3, No. 2, p. 38, of this Bulletin. In that case, the Court held that an administrative finding that an employee's death arose out of and in the course of employment was supported by substantial evidence in the record considered as a whole, under the principle of the *Universal Camera* case. The finding at issue was thus treated as a finding of fact by the court, whose review was governed by the substantial evidence rule.

It seems clear, however, that the finding in question is neither solely one of fact nor one of law. It involves the application of a statutory concept—"arising out of and in the course of employment"—to a particular factual situation, *i.e.*, the application of law to fact. Under *Gray* v. *Powell*, 314 U. S. 402 (1941), and the line of cases following it, the scope of review of findings of this type is a limited one, patterned upon the narrow review which is available over findings of fact. Under *Gray* v. *Powell*, the rule that questions of statutory construction are for the courts loses much of its force.

It has been argued that the doctrine of *Gray* v. *Powell* has been done away with by that portion of section 10 of the APA which provides that the "reviewing court shall decide all relevant questions of law." Under this view, a finding like that at issue in the *Brown-Pacific-Maxon* case, which involves a question of statutory interpretation, is primarily one of law and, hence, one which is to be determined by the reviewing court itself under section 10 of the APA. However sound this view may be, it should be emphasized that it has not been followed by the Court in the *Brown-Pacific-Maxon* case. If section 10 of the APA was, in fact, intended by its sponsors to alter the doctrine of *Gray* v. *Powell*, that intent has been defeated by the convenient labelling by the Court of the finding at issue in the *Brown-Pacific-Maxon* case, as one of "fact."

APA AND EVIDENCE

That the common-law rules of evidence are not, as such, binding upon administrative agencies, in the absence of statutory provisions that they are to control, is today almost hornbook law. A more difficult question concerns the extent to which incompetent evidence can be relied upon to support a finding. Under the so-called "legal residuum" rule, which was first articulated in 1916 by the New York Court of Appeals (*Matter of Carrol* v. *Knickerbocker Ice Co.*,

218 N. Y. 435), though an administrative agency may admit incompetent evidence, its decision cannot rest solely upon such evidence. That rule has been strongly criticized, among others by Wigmore, who felt that it still virtually requires the agency to test its proceedings by the jury-trial rules and "thus holds out the temptation to practitioners to employ the whole arsenal of technical weapons and secure a record full of errors." 1 *Wigmore on Evidence* 40. With all respect, it is difficult to see the justice of this criticism. Under the "legal residuum" rule, the administration is expressly freed from the common-law rules of evidence. Since any evidence at all may be admitted, practitioners know that a "record full of errors" cannot be secured no matter how freely they may employ their "arsenal of technical weapons." All that is required is that the administrative findings themselves are supported to some extent by competent evidence. If the legal rules of evidence have any relation to the search for truth, then the "legal residuum" rule is a sound one.

It has often been asserted that the federal courts refuse to follow the "legal residuum" rule. And this is true despite the famous statement of Chief Justice Hughes in the *Consolidated Edison* case: "Mere uncorroborated hearsay or rumor does not constitute substantial evidence." 305 U. S. 197, 230 (1938). As it has often been expressed, the federal courts will look only to the quantity not to the quality, of the evidence supporting a finding. If the supporting evidence is substantial, the finding will be upheld, even though the evidence may be incompetent. A question which has not yet been determined, however, is that of the effect of section 7(c) of the Administrative Procedure Act upon the federal practice. According to Professor Davis, "Congress in the APA clearly avoided the requirement of competent evidence to support a finding." *Davis on Administrative Law, 459.* One wonders whether that is, indeed, the meaning of the APA provision that orders and rules must be "supported by and in accordance with the reliable, *probative,* and substantial evidence." [§7(c)] Under this, the reviewing court would appear to be required to consider the quality as well as the quantity of the evidence. And it is difficult to see how supporting evidence can be "probative" if it is wholly incompetent evidence. As stated by the Senate Judiciary Committee, under section 7 (c), "the standards and principles of probity and reliability of evidence must be the same as those prevailing in courts of law and equity in nonadministrative cases." *APA, Legislative History* 208 (1946.)

Some recent cases appear to bear out this viewpoint. *In re Knauff,* Pike & Fischer, 1 Ad. L. 2d 639, a decision of the Board of Immigration Appeals, approved by the Attorney General, was the most recent phase of a now-celebrated alien exclusion proceeding. In that case, the Board, in effect, based its decision upon the "legal residuum" rule, saying that while hearsay evidence is clearly admissible in an administrative proceeding, if it is uncorroborated, an order may not be based upon it. "Hearsay is still hearsay whether it is introduced into a court or before an administrative agency. The line of cases which permits the admission of hearsay evidence and the relaxation in administrative hearings of traditional rules of evidence has been widely misinterpreted by administrative boards and com-

missions. It does not give them carte blanche to consider that everything and anything is of the highest probative value." (642).

See also *NLRB* v. *Russell Mfg. Co.*, 191 F. 2d 358 (5th Cir. 1951); *Cream Wipt Food Prod. Co.* v. *Federal Security Admin.*, 187 F. 2d 789 (3d Cir. 1951) (hearsay and unexplained opinion evidence not enough to support finding.)

OTHER APA CASES

Applicability—An ICC order granting a common carrier by motor vehicle additional operating authority has been set aside because of the fact that the examiner who had heard the matter for the Commission had not been appointed pursuant to section 11 of the APA. *L. A. Tucker Truck Lines* v. *United States*, 100 F. Supp. 432 (E.D. Mo. 1951). The court relied on both the *Riss* and *Wong Yang Sung* cases (341 U. S. 907; 339 U. S. 33). While the latter case was one dealing with personal rights and this action dealt with property rights, the court said that no distinction should be drawn between the two insofar as the applicability of the APA was concerned.

Compare *W. J. Dillner Transfer Co.* v. *United States*, 20 Law Week 2235 (W.D.Pa. 1951) (failure to object to non-APA examiner before ICC bars objection on review).

The APA examiner requirements have again been held inapplicable to alien exclusion proceedings. These may continue to be heard before Boards of Special Inquiry appointed pursuant to the Immigration Act. *Wah* v. *Shaughnessy*, 190 F. 2d 488 (2d Cir. 1951).

Compare *United States ex rel Harisiades* v. *Shaughnessy*, 187 F. 2d 137 (2d Cir. 1951) (APA inapplicable to deportation proceeding initiated prior to effective date of APA).

Rule-making—The CAB had provided by regulation that the licenses of irregular carriers would terminate on a stated date, but that upon the filing of an application for an individual exemption, the previous licenses would continue in effect until the decision upon the applications. While the applications of several carriers were filed and pending, the Board, without hearing, issued an amended regulation, which fixed a maximum number of flights per month while the exemption applications were pending. This, said the court, was contrary to the hearing requirements of the APA. "The position taken by the Board is one which would hack away at the Administrative Procedure Act." *American Air Transport* v. *CAB*, 98 F. Supp. 660, 661 (D. C. 1951). However much one may sympathize with the holding, it is difficult to see how it is required by the APA. It may well be that an agency cannot issue a rule which reduces the scope of an outstanding license, without giving those affected an opportunity to be heard. But once the case involves a rule-making proceeding, it clearly comes within section 4 of the APA, which does not contain any formal hearing requirements, unless they are expressly imposed by the enabling statute.

Findings.—In *Capital Transit Co.* v. *United States*, 97 F. Supp. 614 (D. C. 1951). a three-judge district court dealt with the requirement of findings contained in section 8(b) of the APA. In a proceeding under

the Motor Carrier Act for a certificate of convenience and necessity, the ICC made its ultimate findings in terms of that Act itself, *i.e.*, "that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the requirements of law," etc. In addition, a lengthy opinion was filed setting out the facts in detail and the applicable considerations. This, said the court, was adequate. The APA does not require detailed findings of every subsidiary evidentiary fact. So long as the agency makes amply clear the factual basis upon which it has proceeded, there can be no ground for complaint.

Availability of review.—The question of the effect of the APA upon the availability of review has been considered in several cases. In *Clement Martin* v. *Dick Corp.*, 97 F. Supp. 961 (W. D. Pa. 1951), plaintiff sought to restrain the Surgeon General of the United States from giving effect to his approval of a contract with the defendant corporation for the construction of a hospital. Plaintiff, whose low bid for the construction had been rejected, alleged fraud and illegality and asserted a right of review under section 10 of the APA. The court held, however, that plaintiff was not adversely affected or aggrieved by any action within the meaning of any relevant statute under which the APA might be invoked. The APA, said the court, did not create rights but confers jurisdiction to review discretionary acts of agencies which affect existing statutory rights.

A questionable provision of the APA is that portion of section 10 under which that section is not applicable so far as "agency action is by law committed to agency discretion." If this language is taken literally, it would bar review under the APA in the most significant cases, for important exercises of administrative authority today almost always involve the exercise of discretion. This was, indeed, the contention of the Secretary of the Interior in *Homovich* v. *Chapman*, 191 F. 2d 761 (App. D. C. 1951). He argued that there can be no review under the APA where agency action involves discretion or judgment. This contention was rejected by the court. "Obviously the statute does not mean that; almost every agency action 'involves' an element of discretion or judgment." The mere fact that the acts of the Secretary required the exercise of discretion and judgment on his part did not, therefore, preclude judicial review of his action.

The approach of the Court of Appeals for the District of Columbia has usually been overlooked. Thus, in a case arising in the Fourth Circuit, review was sought under the APA of the decision of the Secretary of the Treasury in refusing to remit customs duties. The court held that agency action committed to agency discretion was expressly exempted from review under section 10. Since the remission of duty was committed to the discretion of the Secretary, the APA can have no application. *United States* v. *Cottman Co.*, 190 F. 2d 805 (4th Cir. 1951). See, similarly *Alley* v. *Craig*, 97 F. Supp. 576 (S. D. Maine 1951) (no review under APA of exercise of discretion such as that involved in matters of personnel).

Compare *Air Line Dispatchers Ass'n.* v. *National Mediation Board*, 189 F. 2d 685 (App. D. C. 1951) (action against Board for judgment determining Board had jurisdiction of representation dispute between

carrier by air and employees in foreign countries upheld under APA); *Railway Express Agency* v. *Kennedy*, 189 F. 2d 801 (7th Cir. 1951) (no review under APA where statutory preclusion of review).

OTHER FEDERAL CASES

Initiation of proceedings.—The dismissal of an unfair labor practices complaint issued by the NLRB upon charges filed by a union is a matter for the discretion of the Board. Unless there is an abuse of discretion, the Board's determination that public interest did not require it to retain jurisdiction will not be reviewed. *Local Union No. 12* v. *NLRB*, 189 F. 2d 1 (7th Cir. 1951). See, similarly, *Haleston Drug Stores* v. *NLRB*, 187 F. 2d 418 (9th Cir. 1951).

Notice.—A discrepancy between the unfair labor practice set out in the charge to the NLRB and that set out in the Board's complaint was objected to in an enforcement proceeding by the Board. This objection, said the Court of Appeals for the Third Circuit, misconceives the function of the charge. The purpose of the charge is not to define the issues to be tried with the precision that is sought normally in pleadings in law suits. The purpose of the charge is to give the Board a preliminary basis for determining whether to proceed in the investigation of the case. For this purpose, it is not essential that it be precise. Indeed, it would not be consistent with the general investigatory nature of the action on the charge to confine the subsequent complaint to its allegations. *NLRB* v. *Kingston Cake Co.*, 191 F. 2d 563 (3d Cir., 1951).

Service of a copy of the charge to the NLRB by registered mail in accordance with a Board regulations has been held valid. The charge comes within the statutory authorization to serve by registered mail "complaints, orders, and other process and papers of the Board." *NLRB* v. *Wiltse*, 188 F. 2d 917 (6th Cir. 1951).

Cross-Examination.—In a proceeding for compensation under the Longshoremen's and Harbor Workers' Compensation Act, the deputy commissioner received in evidence, over the vigorous objections of the employer and insurance carrier, two letters by doctors giving their opiinon on claimant's condition. Their authors did not take the stand, although both were readily available. The Court of Appeals for the Fifth Circuit asserted that the administrative procedure here was improper. By admitting these *ex parte* statements, the right of cross-examination was effectively denied upon a crucial issue. *Southern Stevedoring Co.* v. *Voris*, 190 F. 2d 275 (5th Cir. 1951).

Oral argument.—Denial of the right to oral argument before the NLRB on respondent's exceptions to the trial examiner's report has been held not to violate due process in *NLRB* v. *Clausen*, 188 F. 2d 439 (3d Cir. 1951). This is a discretionary matter for the Board, said the court, and, in the circumstances of the case, there was no abuse of discretion. It should be noted that under section 8(b) of the APA, there is no requirement of oral argument before the agency heads. All that is necessary is that the respondent be given a "reasonable opportunity" to take exceptions and submit proposed findings or conclusions.

Disqualification.—In an interesting decision, the SEC has held that the procedure for disqualification for bias contained in section 7(a) of the APA does not apply to charges of bias made against the heads of an agency. Section 7(a), by its terms, applies only to charges of bias made against examiners and other officers who recommend or participate in decisions. *In the matter of the United Corp.*, Pike and Fischer, 1 Ad. L. 2d 550 (SEC 1951).

Exclusion from agency practice.—In the matter of John L Camp, Pike and Fischer, 1 Ad. L. 2d 500 (NLRB 1951), involved a proceeding before the NLRB brought by its General Counsel to show cause why respondent attorney should not be excluded from further practice before the Board because of an assault committed upon an attorney representing the General Counsel in the course of an unfair labor practice proceeding. The Board issued an order excluding respondent from practice before it for a period of two years. The Board stated that, as a quasi-judicial agency entrusted with the enforcement of a declared public policy, it possessed, as it must, an inherent power reasonably to control practice before it in the interest of preventing disruption of its proceedings and to protect its processes and agents from being held up to disrepute. Nor was the result affected by the provision of section 6(a) of the APA giving persons the right to appear before agencies with counsel of their own choice. This right, said the Board, is subject to its power to regulate practice before it.

Res judicata.—The determination by the SEC in a reorganization proceeding under the Public Utility Holding Company Act that the officers, directors, and controlling stockholders were to be treated as creditors, not as stockholders, with respect to preferred shares which they had purchased during the period of formulation of the reorganization plan, has been held *res judicata* in a subsequent proceeding for the partial dissolution of the reorganized corporation. In a case of this type, the SEC was acting in a quasi-judicial capacity and its determinations are vested with a *res judicata* effect. *In re Federal Water and Gas Corp.*, 188 F. 2d 100 (3d Circ. 1951).

Primary jurisdiction.—Plaintiff, a non-scheduled interstate air carrier brought suit under the anti-trust laws against an association of regularly certified air carriers. Alleging that defendant airline conspired to monopolize air-borne commerce, hindered and prevented plaintiff from obtaining ticket agencies, discredited plaintiff, prevented competition, offered to cut prices until competition was eliminated, and refused vital maintenance at airports, the complaint asked for injunctive relief and for treble damages. The court held that the provisions of the Civil Aeronautics Act covered the dominant facts alleged and that the CAB consequently had primary jurisdiction to issue cease and desist orders against the unfair methods of competition alleged. It is true that the Board may ultimately determine that it lacks jurisdiction over certain phases of the complaint. But until it does so, recourse may not be had to the courts. The prayer for treble damages, says the court presents a different problem. The CAB has no power to award damages. The district courts are consequently not deprived of jurisdiction of an air carrier's suit for treble damages for violation of the

anti-trust laws. *S. S. W., Inc.* v. *Air Transport Ass'n.*, 191 F. 2d 658 (App. D. C. 1951).

Where does this leave the individual who seeks relief from the unfair methods alleged? According to the court, the district court is to retain jurisdiction of the anti-trust suit while plaintiff seeks his remedies from the Board. After the Board decides, the court will have the benefit of its decision in determining whether to award damages. The court admits that this may make for considerable delay, but it sees no other way out.

It is difficult to see why, in a case like this, the plaintiff cannot get his decision in one tribunal. As stated by Judge Clark, who concurred, there is no sound reason why the plaintiff should be required to split his cause of action by obtaining a cease and desist order from the Board before coming into court to seek damages. Since the district court clearly has jurisdiction to award damages, it should afford complete relief in the one action. To require plaintiff to go first to the Board, then to the court, is but to require a needless duplication of effort on his part. Truly, to paraphrase Justice Frankfurter, this danger is not likelihood of thus marching the king's men up the hill and then marching them down again seems a mode of judicial administration to which one cannot yield concurrence. *City of Yonkers* v. *United States*, 320 U. S. 685, 694 (1944).

Another interesting primary jurisdiction case was *Lichten* v. *Eastern Airlines*, 189 F. 2d 939 (2d Cir. 1951). Plaintiff there brought an action against an air carrier for the loss of jewelry contained in a bag checked with defendant. The tariff rules of the carrier, which were filed with the CAB, provided that the carrier was not to be liable for the loss of jewelry. The court held that plaintiff's complaint was subject to a motion for summary judgment. The court was without jurisdiction until plaintiff applied to the Board for a ruling on the legality of the carrier's rule.

Here, it would seem that the court is carrying the primary jurisdiction doctrine too far. The plaintiff's case was based upon the proposition that the tariff rule which excludes all liability for the loss of jewelry is void. This is a pure contention of law, and it has often been held that where only such questions are involved, the primary jurisdiction doctrine does not apply. What is to be gained here, other than delay, by requiring plaintiff to resort to the CAB for a decision on the legality of the rule which would then be subject to full judicial review? One can do no better here than to quote from the dissent of Judge Frank on this point:

> "If 'exhaustion of administrative remedies' is demanded in a case like this, the result will be the exhaustion of litigants. To say that plaintiff's suit is premature suggests that a mature suit is a ripe one, and recalls Rabelais' Judge Bridlegoose; He insisted that litigation is like fruit which must not be picked until it has ripened; he explained that he long delayed each of his decisions because, as a consequence, neither party to any suit cared how it ended. But Bridlegoose was a French judge of a bygone era, and it is an ancient, but still prized, Anglo-American principle, embodied in the Bill of Rights of many of our States, that every citizen ought to obtain 'justice promptly and without delay.' To postpone suit here until the Board considers

whether it had authority is to engage in a 'delaying formalism,' an 'idle form,' to require the sort of nugatory act with which courts dispense in all sorts of situations."

Standing.—In *National Coal Association* v. *FPC,* 191 F. 2d 462 (App. D. C. 1951), a trade association of coal companies and labor unions of their employees filed petitions for review of an order of the FPC granting a certificate of public convenience and necessity for the construction of a gas pipe line to supply the Atomic Energy Commission's plant at Oak Ridge, Tennessee. The Commission asserted that the injury to petitioners, which was said to result from the displacement of coal by natural gas, was too remote and conjectural to qualify them as parties "aggrieved" within the meaning of the statutory provision for review. This assertion was rejected by the court, which held that one threatened with financial loss through increased competition resulting from an administrative order is sufficiently aggrieved to be entitled to review.

Judge Clark, who concurred, strongly disagreed upon this point. The petitioners, said he, have no such direct legal interest in the subject matter as would enable them to maintain this action. "There must be a limit to the number of petitions for review which can be maintained. Were it otherwise the courts would be hopelessly swamped." (469).

The fear expressed by Judge Clark seems groundless. In the words of a leading case, "there are no such horrendous possibilities." The first decision by a reviewing court will have a *stare decisis* effect, and where federal Courts of Appeals have exclusive jurisdiction to review, the filing of a petition with one court will prevent other courts from entertaining similar petitions filed subsequently by other aggrieved persons. *Associated Industries* v. *Ickes,* 134 F. 2d 694, 707 (2d Cir. 1943).

In a situation like that presented in the *National Coal Association* case, it is most unlikely that the FPC order would have ever been brought before the courts if petitioners had not been permitted to challenge it. In a practical sense then, such administrative action would be placed in a conclusive position, for it would never be challenged by the only other parties involved, the Commission or the successful applicant. In view of the role of the courts in our polity in controlling executive action, it is of the utmost importance that agency action should not be placed in such a position of finality. In these cases, review should be made available at the suit of the one party who can challenge the administrative action. As stated by the Supreme Court in the famous *Sanders* case, 309 U. S. 470, 477 (1940), "Congress had some purpose in enacting §402(b) (2). It may have been of opinion that one likely to be financially injured by the issue of a license would be the only person having a sufficient interest to bring to the attention of the appellate court errors of law in the action of the Commission in granting the license."

The standing of a consumer has been upheld in *Pollak v. Public Utilities Commission,* 191 F. 2d 450 (App. D. C. 1951). In that case, a transit company had installed loudspeakers in its vehicles for radio broadcasts. Upon protests of passengers of the company, the Commission ordered an in-

vestigation and, after hearing, issued an order which "dismissed" the investigation. The court held that an appeal from the Commission's order could be taken by passengers of the company. Since the appellants have to use the company's service they are adversely affected by the order and may appeal.

On the other hand, in *Clement Martin* v. *Dick Corp.*, 97 F. Supp. 961 (W.D. Pa. 1951), the interest of a taxpayer, desirous of preventing waste of public funds, was held not sufficient to enable a review action to be maintained. This has been the consistent holding of the federal courts since *Massachusetts* v. *Mellon*, 262 U. S. 447 (1922), and should be compared with the situation in many of the states where so-called "taxpayers suits" are more freely allowed.

Jurisdictional fact.—In *Luckenbach S. S. Co.* v. *Lowe*, 96 F. Supp. 918 (E.D. Pa. 1951), plaintiff sought to set aside an award made under the Longshoremen's and Harbor Workers' Compensation Act and requested a trial *de novo* on the jurisdictional issues of the place of the injury and the existence of the master-servant relationship. The court held that the plaintiff could not claim a trial *de novo* as a matter of right. Although *Crowell* v. *Benson*, 285 U. S. 22 (1932), construed the Act to empower the district court to try *de novo* the issues of jurisdictional fact, the Act did not compel the court to do so without the exercise of discretion. Here, said the court, it was unwilling to hear *de novo* the same testimony already offered before the deputy commissioner.

STATE DEVELOPMENTS

Intermediate Reports.—Under the process of administrative decision which has become common in this country, with the hearing conducted by a subordinate employee of the agency and the decision made by the agency heads themselves, one of the key problems has concerned the means by which those in the agency who decide are to be made adequately acquainted with the evidence and arguments presented at the hearing. The means generally adopted has been for the officer who presided at the hearing to prepare an intermediate report, in which he summarized his impressions of the evidence and arguments and often recommended a decision, to aid the agency heads in their decision of the case. Such report would be available to the parties, who could take exceptions thereto. It should be noted, however, that though this intermediate report procedure has become the normal practice, there is no legal requirement that the agency follow it, unless such requirement is imposed by statute. As stated by the Supreme Court in the first *Morgan* case, while it would be good practice for the hearing officer to prepare and submit a report, "we cannot say that that particular type of procedure was essential to the validity of the hearing." 298 U. S. 468, 478 (1936).

Because of the desirability of the intermediate report procedure, the legislature has often intervened to require what the Court held it could not legally demand in the first *Morgan* case. Thus, the essentials of the intermediate report procedure are imposed by the Federal and Model State Administrative Procedure Acts. §§ 8(a), 10. A similar requirement appears to be

imposed by the statute which governs proceedings of the Railroad Commission of Texas. Vernon's Ann. Civ. Stat. Art. 911(b), § 14(b). It provides that, after a hearing has been conducted by an examiner, "it shall be his duty promptly to make a written report to the Commission." Such report is to contain a brief narrative statement of the evidence and a recommended disposition of the case.

In *Merchants Fast Motor Lines* v. *Newman,* 236 S.W. 2d 646 (Tex. App. 1951), the Texas Commission had decided the case although a written report had not been made to it by the examiner. This failure to comply with the statute, the court held, did not invalidate the Commission's action. The requirement of the statute, asserted the court, is directory only.

> "We consider such requirement of the statute to be made for the benefit and convenience of the Commission and a requirement which the Commission may, as it apparently did here, waive." (648).

The soundness of the decision of the Texas court on this point may be questioned. The requirement of an examiner's report is one which is imposed primarily for the benefit of the parties, who are thus enabled to know the views of the hearing officer upon which the agency heads will rely. Since, even without the statute, the agency can require the examiner, who is its employee, to submit a report in any case it wishes, it is somewhat far-fetched to assume that the legislature imposed the report procedure only for the agency's benefit or to say that a command to the agency to follow the intermediate report procedure is a mere instruction for the guidance and government of those on whom the duty is imposed. A better view would appear to be that the legislative requirement is mandatory. The failure to comply here should go to the "essence" as much as those defects in formal procedure that our courts have often held to invalidate transactions. If the view of the Texas court were generally adopted, the effects would be very widespread. It would mean, for example, that the requirements of section 8 of the federal APA are, in effect, mere maxims of administrative morality, which cannot be enforced by the courts.

Standing.—In *Ivory* v. *Edwards,* 105 N.Y.S. 2d 48 (App. Div., 1st Dep't., 1951), the plaintiff, individually as owner of an employment agency and as treasurer of an association of employment agencies, brought an action against the members of the New York State Commission Against Discrimination for a declaratory judgment that a certain regulation and certain rulings of the Commission were invalid. The regulation in question was a general one, applicable to all employers and employment agencies, including the individual plaintiff, requiring them to post a certain notice in all places of employment. The court had little difficulty in holding that plaintiff individually could attack the validity of the regulation. Being a regulation having the purported force of law and being made mandatory on all employers and employment agencies, it could be challenged in the form of a declaratory judgment action. The plaintiff was not required to put herself in the position of disobedience to the regulation and incurring the consequence of having the Commission take action against her.

The rulings of the Commission, which plaintiff also sought to challenge were said by the majority of the court to fall into a

known as the Select Committee on Statutory Instruments. It scrutinizes all regulations which are laid (hence, it has been nicknamed the Scrutiny Committee), and draws the special attention of the House to regulations which appear to be out of line with the normal practice of rule-making.

The British technique enables Parliament to maintain a continuous supervision over administrative legislation wholly unlike that usually exercised by American legislatures. For one thing, it brings the legislature into much closer contact with the administration than occurs in this country. A British M.P. who wishes to object to some regulation can do so directly on the floor of the House. The American legislator, on the other hand, can only place his objections before the agency concerned. If the agency refuses to meet the objection, he can seek to bring indirect pressure against it; there is normally no direct machinery for legislative annullment of particular regulations analogous to the British technique.

It is from this point of view that the Connecticut procedure for legislative review of regulations should be appraised. It represents a most worthwhile experiment which deserves to be closely watched by those who are concerned with correcting one of the most obvious weaknesses of our administrative law.

LITERATURE

Books:

Administrative Law. Davis, K. C., West Publishing Co., 1951, Pp. xvi, 1024. This work contains the most complete account of administrative law that has yet been published in this country. It treats of the background of the subject; the delegation of authority; powers of investigation, supervising, prosecuting, advising, declaring, and informally adjudicating; rule-making; the various aspects of adjudication procedure; res judicata; tort liability; availability and scope of review. Each of these subjects, except perhaps for delegation, is treated more fully than has been attempted in any comparable text. This is not to say, of course, that one need necessarily agree with the author's viewpoint or the details of his treatment of the various aspects of the subject, but only that he does make a conscious effort to treat in some detail all of the important matters which are considered in this country to pertain to administrative law. Though one may quarrel with the author's viewpoint and conclusions, it cannot be denied that even the mere presentation of the major problems in logical order will be of the greatest aid to those interested in administrative law. As Davis, himself, states, "The field is still so unruly that one is sufficiently ambitious who attempts to dig out and organize the problems, to present such law as is susceptible of summary, to discuss pros and cons, and to contribute here and there to solutions."

Administrative Law: A Text. Parker, R., Bobbs-Merrill Co., 1952, Pp. x, 344. A general survey of administrative law. It covers the constitutional and statutory background of the subject; the establishment, organization and jurisdiction of administrative agencies; administrative functions of investigation, rule-making, and adjudication; judicial review; execution of administrative decisions; and damage claims for wrongful administrative acts.

different category. They appeared to be in the nature of case rulings made on the facts of particular cases which had been before the Commission and were published for the information of the public. While presumptively such rulings would be applied in similar cases which might come before the Commission, they were not self-executing. They merely laid down principles to govern the action of the Commission. It was only when such principles were applied in a specific case by the issuance of a complaint against the plaintiff that an actual controversy cognizable by the courts would arise.

There was a strong dissent, which urged that the rulings in question should be subject to challenge in a declaratory judgment action. According to it, the complaint set forth specific pre-employment inquiries that the Commission, by the rulings declared "unlawful." The official promulgation of the rulings denouncing disobedience as "unlawful," was clear indication that they were obligatory and had to be followed under threat of prosecution against anyone who violated them. Plaintiff was not obliged first to violate the rulings and thus raise the issue by a complaint against her. And plaintiff was in a doubly precarious position because her business was a *licensed* business. The ultimate penalty for conduct declared "unlawful" might perhaps be deprivation of her livelihood. For, if prosecuted and held guilty of "unlawful" conduct by the Commission, charges might then be made against her before the licensing Commissioner. As the dissent asserted, "This is one of the perilous alternatives to the rational, sensible and legal procedure for a declaratory judgment that plaintiff has here taken." (586).

Legislative review.—Section 285 of the General Statutes of Connecticut contains an interesting provision for the legislative review of the regulations promulgated by that State's administrative agencies. Under it, the secretary of state is directed to submit a certified copy of all effective regulations to each session of the legislature. Such regulations are to be referred to an appropriate committee for its consideration and such committee is to schedule hearings thereon. Any regulation, or any part thereof, which is disapproved by the legislature is to be void and to cease to have effect.

Legislative review of all regulations is something which is not common in the American practice. It is true that in some cases, direct legislative control of this kind is provided with regard to specific types of regulations. An example which readily comes to mind is the federal Reorganization Act of 1949. Presidential reorganization plans which may be made under that statute must be transmitted to the Congress. Such plans remain inoperative for sixty calendar days of continuous session after they are transmitted, during which period they can be nullified by an adverse vote of either House.

Direct control by the legislature of the Reorganization Act type tends to be comparatively rare in this country. It is to Britain, instead, that one who seeks for an analogy to the Connecticut statute must turn. In Britain, most administrative regulations must be laid before Parliament after they are promulgated. Such regulations may be annulled by vote of either House, within forty days. To aid it in reviewing regulations, the House of Commons has set up a bi-partisan committee of some twelve M.P.'s,

Administrative Agencies and the Courts. Cooper, F. E. University of Michigan Law School, 1951, Pp. xxvi, 470. The purpose of this most recent volume in the Michigan Legal Studies is to examine the relationship between administrative agencies and the courts, with particular reference to judicial doctrines concerning: (1) constitutional limitations on the delegation of powers to administrative agencies; (2) procedural requirements in cases where agencies exercise judicial powers; (3) procedural and substantive requirements imposed in connection with rule-making activities; (4) methods and scope of judicial review. The work constitutes a useful contribution to the growing literature upon the subject.

Le Droit Administratif Américain: Notions Générales. Schwartz, B. Librairie du Recueil Sirey, Paris, 1951, Pp. x, 246. An attempt by an American administrative lawyer to explain the fundamentals of his system to a civil-law audience. The book begins with a discussion of the bases of administrative law in the common-law world, indicating how they differ from those upon which the French system is grounded. This is followed by a description of the background and characteristics of the American administration. Rule-making and adjudicatory powers and procedures are analyzed in some detail, as are the availability and the scope of judicial review. The work concludes with a chapter on the liability of the State and public officers, which emphasizes the provisions of the Federal Tort Claims Act of 1946.

Articles: General:

Administrative Courts in France. Schwartz, B., 29 Can. B. Rev. 381, April 1951. A detailed comparative account of the courts which exercise administrative law jurisdiction in the French system. It is stated that study of the *droit administratif* today is particularly relevant in view of recent proposals in this country for the creation of specialized administrative courts, like those which exist in France.

Administrative Hearing for the Suspension of a Driver's License. Johnston, P. A., 30 N. C. L. Rev. 27, December 1951. A survey of the situation in the various States. It is asserted that though operation of motor vehicles was early classified as a mere privilege, it is today more akin to a right. As such, full notice and hearing must be available.

Administrative Interpretations. Parker, R., 5 Miami L. Q. 533, June, 1951. The types of agency interpretations; the difference between those which are and those which are not binding; the effect of the APA. It is asserted that, here as elsewhere, the APA, despite the obvious intention of its sponsors, has not clarified the situation.

Administrative Law. Schwartz, B., 1950 Annual Survey of American Law 105. A survey of developments during 1950.

Administrative Procedure Act: A Study in Interpretation. Netterville, V. S., 20 Geo. Wash. L. Rev. 1, October 1951. A lengthy analysis whose purpose is to review the basic requirements of the APA, its legislative history on important provisions, and the cases decided under the Act by agencies and courts, with emphasis upon the case-law. Such analysis is intended to clarify the meaning of the Act, and to aid in the determination of what changes or additions appear to be warranted. Various

changes are suggested. Among them are: amendment of sections 7 and 8 so that they will, in fact, apply in all cases of formal rule-making; tightening of the separation of functions provided for in section 5(c); removal of exemptions; vesting of discretion in reviewing courts to liberalize exhaustion-of-administrative-remedies rule; provision for the right of oral argument.

Administrative Procedure Act: A Study in Overestimation. Parker, R., 60 Yale L. J. 581, April 1951. According to the author, the APA has failed to realize the principal purposes of its proponents. Its chief merit is, indeed, asserted to lie in the fact that it has refrained from any telling innovation. Much of the article is devoted to an analysis of the definitions in section 2. It is contended that since the definition of terms itself clarifies little, and even increases existing doubts, the statute cannot easily constitute a technical improvement of the law.

Availability of Judicial Review of Federal Administrative Action. Mendelson, W., 21 Tenn. L. Rev. 738, April 1951. Is review of administrative action available in the absence of statutory provision therefor? The two conflicting views on this are represented by Justices Reed and Frankfurter. The author feels that both can find support for their views in the APA. One wonders, however, whether the Court has not today substantially adopted Justice Reed's view in favor of review.

Central Issues of American Administrative Law. Nathanson, N. L., 45 Am. Pol. Sci. Rev. 348, June 1951. An analysis of some of the key administrative law issues in this country, discussing, first, the Administrative Procedure Act and, then, the requirements of due process. Despite the broad coverage of the APA, the heart of our administrative law is seen to be in the application of the due process clause. Though intended primarily for the layman, the article is useful as a summary of the subject.

Common Lawyer Looks at the Droit Administratif. Schwartz, B., 29 Can. B. Rev. 121, Feb. 1951. A comparative examination of the bases of French administrative law.

Development of Administrative Law. Tresolini, R. J., 12 U. of Pitt. L. Rev. 362, 1951. A discussion primarily of the English background upon which the system in this country is based, covering the early developments, the centralization of administration in the nineteenth century, the recognition of the subject by English writers, and a brief statement of the American experience.

Influence of Administrative Agencies on Accounting. Werntz, W. W., 36 Iowa L. Rev. 270, Winter 1951. A consideration of the purposes underlying the assignment of accounting powers to governmental agencies, the varying ways in which such powers are implemented, and their influence on accounting thinking.

Judicial Review of Administrative Action through Article 78 of the Civil Practice Act (1937-1951). Goldstein, N. L., 2 Syracuse L. Rev. 199, Spring 1951. A summary by the Attorney General of the State of New York of the scope of review under that State's general review statute.

Judicial Review: "Substantial Evidence on the Whole Record." Jaffe, L. L., 64 Harv. L. Rev. 1233, 1951. An analysis of *Uni-*

versal Camera Corp. v. NLRB, 340 U. S. 474 (1951), *NLRB v. Pittsburgh S. S. Co.,* 340 U. S. 498 (1951), and *O'Leary v. Brown-Pacific-Maxon, Inc.,* 340 U. S. 504 (1951).

Separation of Powers Revisited. Parker, R., 49 Mich. L. Rev. 1009, May 1951. A re-interpretation of a fundamental administrative law doctrine.

United States Supreme Court and Administrative Law. Schwartz, B., Current Legal Problems 1951, p. 395. A discussion of the recent administrative law jurisprudence of the Supreme Court. The article deals with the attitude of the present Court, delegations of power, administrative procedure, availability and scope of review.

Articles: State Law:

Administrative Law. Glasser, A., 6 Rutgers L. Rev. 43, Fall 1951. A survey of developments in New Jersey during 1950-51.

Administrative Law of Oklahoma. Merrill, M. H. 4 Okla. L. Rev. 286, August 1951. An essay awarded a tie for second place in the National Essay Contest on State Administrative Law, sponsored by this Section.

Administrative Law in Pennsylvania: Its Present Status and Recommendations for Improvement. Forman, H. I., 55 Dick. L. Rev. 129, January 1951; *A Critique of Recent Administrative Law in the Courts and Legislature of Pennsylvania.* Ely, R. B., 55 Dick. L. Rev. 218, March 1951. Two studies of the subject in Pennsylvania.

Administrative Procedure Act for Texas. Harris, W. R., 5 S. W. L. J. 125, Spring 1951. A proposed APA, with a detailed analysis of its provisions.

How to Study State Government: The Schaefer Commission Reports on Reorganization in Illinois. Watson, G. H., 46 Ill. L. Rev. 19, March-April 1951. A useful survey of the work of the "little Hoover Commission" which has subjected the structure of government in Illinois to critical investigation.

Substantial Evidence Rule: Texas Version. Larson, L. V., 5 S. W. L. J. 152, Spring 1951. An analysis of the scope of review in Texas, which differs substantially from that in other jurisdictions. The Texas rule is seen to superimpose the federal substantial evidence rule (as modified by the APA) upon a trial *de novo.*